APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13752 SEPTEMBER TERM, 1962 SEPTEMBER SESSION, 1962

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

MILLPAX, INC., A CORPORATION, AND ROY F. PAXTON, AN INDIVIDUAL, *Defendants-Appellants*.

Appeal from the United States District Court, Southern District of Illinois, Southern Division

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January 15, 1963

Before SCHNACKENBERG, KNOCH and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. Defendants, Millpax, Inc., and Roy F. Paxton, were found guilty after trial by jury on three counts of a five-count indictment charging them with the misbranding of a drug known as "Millrue," in that its labeling failed to bear adequate directions for use as required by Section 502(f)(1) of the Federal Food, Drug, and Cosmetic Act, as amended, 21 U. S. C. § 352(f)(1), and with causing the introduction or delivery for introduction into interstate commerce of such preparation, so labeled, in violation of Section 301(a) of the Act, 21 U. S. C. § 331(a), which prohibits the introduction or delivery for introduction into interstate commerce of any drug that is misbranded.

Defendant Millpax, Inc., until March 23, 1961, was a corporation organized and existing under the laws of the State of Illinois, with office and principal place of business at Carlock, Illinois. Defendant Roy F. Paxton was secretary-treasurer and principal stockholder of the corporation.

The product in question was packaged in bottles, bearing labels displaying the following printed and graphic matter:

Millrue
Iron Tonic
Hematinic
Stomachic
Contents 8 Fl. Oz.
Manufactured by
Millpax, Inc.
Carlock, Illinois

The errors relied on for reversal arise out of the claimed inadequacy of the evidence to support the verdict, the charge to the jury (which was not objected to), and the failure of the trial court to acquit the defendants on the ground that, as a matter of law, they were entrapped.

On October 7, 1958, the same two defendants were convicted on a plea of guilty for the interstate distribution of "Mill Rue Tonic Hematinic Stomachic" with labeling that falsely represented it to be effective in the treatment of cancer, ulcers, kidney troubles, and bladder troubles. Both defendants in that case paid fines. This Court may properly take judicial notice of the Notice of Judgment reporting the conviction published pursuant to 21 U. S. C. § 375(a). *Colgrove v. United States*, 176 F. 2d 614 (9th Cir. 1949).

On May 2, 1960, Charles Armstrong, a Federal Food and Drug Inspector, wrote defendant Paxton from Memphis, Tennessee, ordering two bottles of Millrue. He enclosed a ten dollar money order. He stated in his letter that he had just been informed that he had cancer, and that he had

read in the "Herald of Health" magazine about "your cancer cure—Millrue." In response to his letter, he received a form letter,[1] prepared and signed by defendants' attorney, directing him to reread the article and to note that no claim is made by the writer or the manufacturer that Millrue cures anything. Concerning the claims made in the magazine article, the form letter to Inspector Armstrong said "Any person may state what he believes the product has done or has not done for him, and any person is free to draw his own conclusions therefrom." It is evident that the form letter was framed with the intention of drawing a cloak of legality around defendants' transactions. While there is a disclaimer in the letter as to any

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[1] The alleged disclaimer letter reads as follows:

"Many thanks for your letter and order and it is regretted that Mr. Paxton cannot write to you personally as the mail has been tremendous and the Company is a small one.

"Your interest in the article referred to is natural, but terming the product a "blood purifier" therein is a misnomer. To "purify" connotes that as to any particular substance it is freed from extraneous matter or from anything that debases, pollutes, or contaminates it. The blood may be variable through bodily functions or malfunctions, and by ingestion, deficiencies when existent may be aided.

"If you will again read the article referred to which was written by Don C. Mottham, you will find that no claim is made that the product cures anything, either by the writer or the manufacturer. Any person may state what he believes the product has done or has not done for him, and any person is free to draw his own conclusion therefrom.

"If you still desire to order please advise by return mail, otherwise your money will be returned to you, as there is no desire by the manufacturer to sell this product under false pretenses.

"Sincerely,

Millpax, Inc.,

By

Theodore W. Hinds"

claims made directly by defendants, the jury is not required to blind itself to reality and fail to recognize the obvious intent of such a letter to adopt the testimonials made by others. No other purpose could be implied in view of the fact that the order from Armstrong specifically mentioned that he was suffering from cancer and that he wanted the Millrue to forestall his having to submit to surgery. We think it reasonable to recognize the plight of those suffering from cancer, their desperate frame of mind of which "cancer remedy" salesmen are undoubtedly aware and the influence these complementary attitudes have on a transaction such as the one in question. It is obvious that defendants intended to be understood as adopting as their own the magazine testimonials. The statement in the disclaimer letter that "Any person may state what he believes the product has done or has not done for him, and any person is free to draw his own conclusion therefrom," within the factual context present here, does not shield defendants from the consequences of their wilful acts.

Armstrong, upon receipt of the form letter, wrote another letter requesting the Millrue. In response thereto he received a package in the United States Mails from Millpax, Inc., containing two bottles of Millrue.

Both defendants were charged in Count III with responsibility for this interstate shipment of a misbranded drug.

Defendants contend that the preparation known as Millrue is not a drug, but is a food for special dietary use excepted by the Federal Food, Drug, and Cosmetic Act, as amended, from inclusion in the term "drug." As discussed above, however, the intention of the defendants was to have prospective purchasers regard it as a drug and so use it; hence, their own actions classified Millrue as a drug. Thus, the use of the term "drug" as used in the indictment and during the trial could not have been prejudicial to defendants.

On April 16, 1960, Inspector Gebhart from the St. Louis office of the Food and Drug Administration and Mrs. Rachel Harrington, a clerical employee of that office, visited defendants' place of business at Carlock, Illinois. They posed as a married couple from Memphis, Tennessee, and indicated they came to Carlock to see if defendant Paxton could find out what was wrong with Mrs. Harrington. They did not suggest to Paxton that she was suffering from any specific disease or ailment.

Paxton asked her to sit on a couch. As soon as she was seated, he began examining her left foot. When he examined the third toe, he told Mrs. Harrington that she had gas on the upper colon which is usually where cancer starts. In response to being asked if she had cancer, he stated that she did. Paxton recommended his Millrue tonic for this condition. He recommended also that she follow a diet and he gave her a printed copy of the directions for such diet. He told her that he had never lost a case of cancer or leukemia, and that she would be all right in three months. He also related that he had acquired the formula for Millrue about forty years ago from an Old India doctor who wanted him to marry his daughter. The diet list and the label on the bottle were the only written directions given the agents for use of Millrue. Agent Gebhart and Mrs. Harrington purchased six bottles of Millrue, and departed. Count IV of the indictment charged defendants with having caused to be delivered to Gebhart and Mrs. Harrington for introduction into interstate commerce the misbranded drug.

A showing that drugs were introduced into interstate commerce is sufficient to show that they were, as well, delivered for introduction into interstate commerce. *United States v. Urlikon Products Co.*, 185 F. 2d 3 (7th Cir. 1950).

The government contends that where a misbranded drug is sold and the seller has knowledge that the purchaser intends to transport the drug to another state, this knowl

edge, in and of itself, is sufficient to bring the transaction within the ambit of 21 U. S. C. § 331(a), i.e., that the sale is an introduction or delivery for introduction into interstate commerce of the misbranded drug. It relies for support of this contention on *Drown* v. *United States*, 198 F. 2d 999 (9th Cir. 1952), cert. denied, 344 U. S. 920; and *United States* v. *Sanders*, 196 F. 2d 895 (10th Cir. 1952). For our purposes we need not decide if these cases support the broad interpretation given to 21 U. S. C. § 331(a) by the government.

While it is true that defendant Paxton not only sold the misbranded product to the government agents and did so intending that it would be taken by them to Tennessee, this intention was and could only have been formulated as a result of a representation made by the government agents which the evidence shows had no basis in reality. If we are to assume that the seller participates in some degree in the intent of the buyer so as to make the buyer's intent his intent, then we must also assume that, where a material misrepresentation by the buyer is made that the transaction is of an interstate character, a federal crime based on interstate commerce cannot exist. If this were not so, government agents would be able to turn a purely "over the counter" sale of a misbranded product into a federal crime merely by an off-hand statement, completely untrue, that they intended to transport the goods across a state line. Here there was no evidence that Gebhart or Harrington came from Tennessee, intended to return to Tennessee, or had ever been in Tennessee. In fact, the evidence is conclusive that St. Louis, Missouri was their point of origin and also their destination when they left Carlock after making the purchase.

The fact that they did cross a state line is immaterial in a situation where the crime is made federal only by virtue of the wrongdoers' participation in their expressed intent. The only intent ever expressed was totally false and we

decline to extend defendants' knowledge of the agents' intent to that deliberately concealed so as to make them aware of the interstate nature of the sale. If this seems a formalism, it is a formalism required under our federal system—particularly where the statute specifically calls for an introduction or delivery for introduction into interstate commerce as a requirement and essential element of the corpus delicti. Situations not involving interstate commerce are not before us and we specifically decline to treat them. *Cf. United Cigar Wholesale Stores Corp.* v. *United States*, 113 F. 2d 340 (9th Cir. 1940); *Sherman* v. *United States*, 10 F. 2d 17 (6th Cir. 1926); *United States* v. *Abda*, 32 F. Supp. 23 (D. C. M. D. Pa. 1940). We are concerned solely with a statute that defines a criminal act under the cognizance of federal authority having as an essential element thereof knowledge of or intent to engage in or affect interstate commerce and actions commensurate with such knowledge or intent.

We think that the interstate element of the crime must rest on something more solid than the pretenses of government agents to satisfy the minimum requirements of basic fair play—that is, due process. Since the interstate element of Count IV was not proved, we hold that the conviction under that count must be vacated.

On May 6, 1960, Jack A Forbragd, an Inspector stationed in San Francisco, addressed a letter to defendant Paxton requesting a bottle of Millrue. The letter stated that he had stomach pains, was constipated, and was sure he had cancer. It further stated that he had read in the "Herald of Health" magazine that Millrue was a cancer cure. He enclosed a money order for $5.20. In response, he received a bottle of Millrue. The labeling contained no reference to cancer, stomach pains or constipation. Defendants, at the trial, attempted to show that a disclaimer letter, worded identically to that sent to Inspector Armstrong, was mailed to Inspector Forbragd. Moreover, Pax-

tor testified that Forbragd in a telephone call from San Francisco acknowledged receipt of the form letter and nonetheless ordered the drug. Forbragd denied receipt of any such letter or that he had made the telephone call. On cross-examination of defendants' witnesses, it was brought out that no attempt had been made to find a record of the telephone call; that the person who allegedly mailed the letter didn't remember mailing it; and that the carbon introduced and claimed to be a copy of the form mailed to Forbagd may have been prepared solely for the purposes of trial. The Forbragd sale was the basis for Count V of the indictment charging defendants with having caused to be introduced and delivered for introduction into interstate commerce a drug misbranded in that its labeling failed to bear adequate directions for use for the purposes and conditions for which the drug was intended, namely, the treatment of stomach pains, constipation, and cancer.

It is elementary that where the ground for reversal is insufficiency of the evidence to support the verdict, the evidence must be construed in the light most favorable to the government and in the light of all reasonable inferences which the jury may draw therefrom. *Glasser* v. *United States*, 315 U. S. 60 (1942). Although defendants introduced versions of the transactions in question different from those of the government, we are convinced that the jury was justified in accepting the government's proof. There is substantial evidence to support the verdict as to Counts III and V

Defendants, on appeal, raise for the first time the defense of entrapment as a matter of law. It is uniform practice for appellate courts to refuse to consider alleged errors not raised in the trial court unless the result would lead to a miscarriage of justice. *Ramirez* v. *United States*, 294 F. 2d 277 (9th Cir. 1961); *United States* v. *Sferas*, 210 F. 2d 69 (7th Cir. 1954), cert. denied, 347 U. S. 935. We are convinced that no injustice resulted from the failure of the

trial court to rule that entrapment had been established as a matter of law. Entrapment as a matter of law is established only where undisputed testimony makes it patently clear that an otherwise innocent person was induced to commit the act complained of by the trickery, persuasion, or fraud of a government agent. *Sorrells* v. *United States*, 287 U. S. 435 (1932). We believe the previous conviction and the surrounding circumstances brought out in the evidence support the conclusion that defendants would have sold the misbranded Millrue regardless of who the purchasers were, and the fact that government agents used a ruse to conceal their identity does not require a different conclusion. The issue of entrapment was properly left to the jury.

We have examined the instructions given by the trial judge and find them to have correctly stated the issues and the law governing the case. The instructions were not objected to at the trial and in the absence of substantial error capable of resulting in a miscarriage of justice we decline to consider the assignments of error now raised for the first time on appeal. *United States* v. *Vason*, 222 F. 2d 3 (7th Cir. 1955).

The judgment entered by the District Court convicting defendants on Count IV is reversed. The judgment convicting defendants on Counts III and V is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Thursday, February 21, 1963

Before HON. ELMER J. SCHNACKENBERG, *Circuit Judge*,
HON. WIN G. KNOCH, *Circuit Judge*, HON. LUTHER M.
SWYGERT, *Circuit Judge*.

No. 13752

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

vs.

MILLPAX, INC., ET AL., *Defendants-Appellants*.

Appeal from the United States District Court for the
Southern District of Illinois, Southern Division.

On consideration of the petition for rehearing filed herein by counsel for defendants-appellants,

IT IS HEREBY ORDERED that the opinion of this Court dated January 15, 1963, in the above entitled cause be changed as follows:

Page 2—Delete the third full paragraph reading:

> "On October 7, 1958, the same two defendants were convicted on a plea of guilty for the interstate distribution of 'Mil Rue Tonic Hematinic Stomachic' with labeling that falsely represented it to be effective in the treatment of cancer, ulcers, kidney troubles, and bladder troubles. Both defendants in that case paid fines. This Court may properly take judicial notice of the Notice of Judgment reporting the conviction published pursuant to 21 U.S.C. § 375(a). Colgrove v. United States, 176 F.2d 614 (9th Cir. 1949)."

Page 7—Delete the words reading, "the previous conviction and," appearing in the fifth sentence in the second full paragraph. The sentence will then read:

> "We believe the surrounding circumstances brought out in the evidence support the conclusion that defendants would have sold the misbranded Millrue regardless of who the purchasers were, and the fact that the government agents used a ruse to conceal their identity does not require a different conclusion."

It Is Further Ordered that the petition for rehearing of this cause be, and the same is hereby, Denied.

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FILED
APR 8 1968

No. 911

In the Supreme Court of the United States

OCTOBER TERM, 1967

[redacted], and Ray V. Parris,
Petitioners,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[redacted]
Solicitor General,

[redacted]
Assistant Attorney General,

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Washington, D.C.

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Statute and regulation:	
Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U.S.C. 301, *et seq.*:	
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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 911

MILLPAX, INC., A CORPORATION, AND ROY F. PAXTON, AN INDIVIDUAL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1963, and a petition for rehearing was denied on February 21, 1963. The petition for a writ of certiorari was filed on March 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain the determination of the jury that petitioners' product "Millrue" was misbranded because its labeling failed to bear adequate directions for its use.

2. Whether the defense of entrapment, which was rejected by the jury, was established as a matter of law by evidence that Food and Drug Administration agents ordered the product without identifying themselves as government agents.

STATUTE AND REGULATION INVOLVED

The Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U.S.C. 301, *et seq.*, provides in pertinent part:

> Section 301 [21 U.S.C. 331]. The following acts and the causing thereof are prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is * * * misbranded.
>
> * * * * *
>
> Section 502 [21 U.S.C. 352]. A drug or device shall be deemed to be misbranded—
>
> * * * * *
>
> (f) Unless its labeling bears (1) adequate directions for use * * *.
>
> * * * * *

21 CFR 1.106(a) provides in pertinent part:

> (a) *Adequate directions for use.*
>
> "Adequate directions for use" means directions under which the layman can use a drug or device safely and for the purposes for which it is intended. Directions for use may be inade-

quate because (among other reasons) of omission, in whole or in part, or incorrect specification of:

(1) Statements of all conditions, purposes, or uses for which such drug or device is intended, including conditions, purposes, or uses for which it is prescribed, recommended, or suggested in its oral, written, printed, or graphic advertising * * *.

* * * * *

STATEMENT

Petitioners, Millpax, Inc., a corporation, and Roy F. Paxton, secretary-treasurer of the corporation, were convicted, after trial by jury, on counts 3, 4, and 5, respectively, of a five-count indictment charging introduction of misbranded drugs into interstate commerce. The misbranding alleged was that the labeling failed to bear adequate directions for use, since it failed to state the purposes, conditions, and diseases for which the drug was intended to be used. The judgment on count 4 was reversed on appeal. On the other two counts, Paxton was sentenced to imprisonment for three years on one, and to three years' probation and $2,500 on the other. Millpax was fined $500 on each count (D.A. 136–138).[1]

The drug involved in each count was called "Millrue." Petitioner Millpax labeled it simply as a dietary food supplement, effective in aiding deficiencies in iron, vitamins B1 and B2, and niacin (Gov. Exs. 4, 9, 10, 11–16; G.A. 17). Petitioner Paxton stated that

[1] "G.A." and "D.A." refer, respectively, to the government's and petitioners' appendices in the court of appeals.

Millrue was useful for the treatment of cancer and its symptoms during interviews with prospective purchasers at the offices of Millpax in Carlock, Illinois (D.A. 28–34, 47–50) and similar claims were made in a magazine article in the March 1960 issue of "Herald of Health" (D.A. 5).

1. The facts with respect to the particular two interstate shipments here involved are as follows:

a. On May 2, 1960, Charles Armstrong, a Federal Food and Drug Inspector, wrote Paxton from Memphis, Tennessee, ordering two bottles of Millrue and enclosing a ten-dollar money order. He said in his letter that he had just been informed that he had cancer, and that he had read in the "Herald of Health" magazine about "your cancer cure—Millrue" (D.A. 23, 121). In response, he received a form letter prepared in March 1960 by petitioners' attorney, Hinds, in anticipation of inquiries resulting from the magazine article (D.A. 71, 82). All mail mentioning any diseases or the "Herald of Health" was forwarded to attorney Hinds (D.A. 86).

The form letter directed Armstrong to reread the article and to note that no claim is made by the writer or the manufacturer that Millrue cures anything (Gov. Ex. 7; D.A. 26). Concerning the claims made in the magazine article, the form letter said: "Any person may state what he believes the product has done or has not done for him, and any person is free to draw his own conclusion therefrom" (Gov. Ex. 7; D.A. 26). On May 10, 1960, Armstrong wrote the corporation in Illinois to send the drug (D.A. 24, 122), and he re-

ceived, in Tennessee, two bottles of Millrue from the defendants on May 20, 1960 (D.A. 24, 25). This shipment constituted the basis for count 3.

b. On May 6, 1960, Jack A. Forbragd, an Inspector stationed in San Francisco, addressed a letter to petitioner Paxton requesting a bottle of Millrue and enclosing a money order for $5.20 (D.A. 5–6). In his letter, he stated that he had stomach pains, was constipated, and was sure he had cancer. He also stated that he had read in the "Herald of Health" magazine that Millrue was a cancer cure (D.A. 5–6). In response to this letter, he received a bottle of Millrue (D.A. 6). The labeling of the drug contained no reference to cancer, stomach pains, or constipation (Gov. Ex. 4; G.A. 17).

Petitioners attempted to show that a disclaimer letter, worded identically to that sent to Inspector Armstrong, was mailed to Inspector Forbragd (D.A. 75). Paxton testified that Forbragd in a telephone call from San Francisco acknowledged receipt of the form letter and nonetheless ordered the drug (D.A. 89). Forbragd denied receipt of any such letter (D.A. 7, 9, 11, 12), and stated that he had never telephoned petitioners or their agents (D.A. 7, 9). On cross-examination of petitioners' witnesses, it was brought out that no attempt had been made to find a record of the alleged telephone call (D.A. 103); that the person who allegedly mailed the letter did not remember mailing it (D.A. 79); and that the carbon introduced and claimed to be a copy of the form mailed to Forbragd may have been typed solely for the purposes of trial

(D.A. 79). This transaction was the basis for count 5.

2. The case was submitted to the jury on a lengthy charge which had been approved by counsel for both parties (D.A. 107–118; G.A. 8). The judge instructed the jury that it would have to consider all the facts to determine whether Millrue was a drug intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease (D.A. 108–109) and whether, if a drug, it was misbranded for failure to bear adequate directions for use (D.A. 109). He told the jury to consider not whether the buyers intended the drug for cancer, stomach pains, and constipation, but whether petitioners intended it to be so used (D.A. 116, 117–118). On the issue of entrapment, the jury was told that the issue was whether petitioners were ready and willing to commit the crime and the government agents merely afforded them the opportunity or whether petitioners had no previous intent or willingness to commit the crime and did so only because of the inducement of the government agents (D.A. 113).

ARGUMENT

1. Section 502 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 352, *supra*, p. 2, provides that a drug "shall be deemed to be misbranded * * * [u]nless its labeling bears * * * adequate directions for use * * *." The regulations promulgated under this section, 21 CFR 1.106(a), *supra*, pp. 2–3, state that "adequate directions for use" requires a statement "of all conditions, purposes, or uses for which such drug * * * is intended * * *." The evidence is

plain and undisputed that the substance involved in this case, Millrue, did not carry labeling stating that it was intended for use in the treatment of cancer or any other disease. Petitioners' contention is that Millrue was a food product, not a drug for the treatment of diseases. This factual issue, however, as to whether petitioners intended that Millrue be used as a drug, was submitted to the jury under instructions which are not questioned. The resolution of that issue by the jury presents no question warranting review by this Court.

Moreover, the evidence clearly supports the jury's determination. Petitioner Paxton, the secretary-treasurer of petitioner Millpax, described Millrue to prospective purchasers as useful in the treatment of cancer. This evidence is alone sufficient to show that petitioners were selling Millrue as a drug. In addition, an article appeared in "Herald of Health" making the same claim. While there is no evidence in the record that petitioners were themselves responsible for this article, it was clearly related to their merchandising. Petitioners, in anticipation of public interest in "Millrue" following national publicity for the product, devised a form letter to be used whenever the magazine article or illnesses were mentioned in the incoming mail. Thus, petitioners were aware that Millrue was widely understood to be a drug for the treatment of cancer. While petitioners' form letter did not claim that the article was correct, it did not disassociate petitioners from it. Thus, the jury could reasonably conclude that petitioners' form letter intended to exploit for Millrue the article's claims

although endeavoring to draw, as the court of appeals stated (Pet. App. 3a), a "cloak of legality" around the transactions by refusing to make any explicit claims of its own. In short, the letter of disclaimer, however artful, could reasonably be deemed to create the impression that representations for Millrue made in the magazine article were not repudiated, but could be relied on by the purchaser.

Petitioners are not being punished for representations by others; they are being punished for their own acts in selling a substance with the knowledge and intent that it be used as a drug without adequate directions for use. There was ample evidence, on which the jury could rely, that petitioners had such intent.[2]

2. The trial court gave the jury complete instructions on the issue of entrapment (D.A. 112–114), to which petitioners did not object. The jury rejected petitioners' factual contentions in finding them guilty. Thus, petitioners' argument here must be that entrapment was established as a matter of law.

We submit that the jury reasonably found on this record that petitioners were not entrapped. This Court has held that entrapment is shown "when the criminal design originates with the officials of the Government, and they implant in the mind of an inno-

[2] This Court's decision in *United States* v. *Johnson*, 221 U.S. 488, is not apposite. There, this Court held that false therapeutic claims were not misbranding under the Food and Drug Act because the Act related only to false statements concerning the identity of the drug. Since that decision, Congress has amended the Act to require in Section 502 that the label include "adequate directions for use * * *."

cent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." On the other hand, the fact that government agents "merely afford opportunities * * * for the commission of the offense" is not entrapment. *Sorrells* v. *United States*, 287 U.S. 435, 442, 441. See also *Sherman* v. *United States*, 356 U.S. 369, 372–373. Here, the record is devoid of any testimony that petitioners were in any way swayed by entreaties by the government agents in filling their requests. The transactions with inspectors Armstrong and Forbragd were impersonally conducted through the mails. The fact that petitioners had ready a prepared letter shows that they were ready and willing to engage in a mail-order business based on the magazine article. Furthermore, the evidence shows that, in over-the-counter sales to customers from out-of-state, Paxton refused to initial sales receipts for the reason that there was "a Federal agent out snoo[p]ing around" (D.A. 96). Petitioners were clearly not innocents induced to commit crime, but were ready and willing to make sales to whomever desired to buy.[3]

[3] The decision of the Court of Appeals for the District of Columbia in *Johnson* v. *United States* (No. 16890, February 14, 1963) held only that where government funds were used to make a purchase there was enough of a question of entrapment to warrant submission of the issue to the jury.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
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APRIL 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963